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No. 80-2166
IN THE

Supreme Court of the United States

October Term, 1981

MARY TABEROFF,
Petitioner,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Intervenor,

vs.

FARMERS GROUP, INC., and FARMERS INSURANCE GROUP,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

The Respondent, Farmers Group, Inc.,* respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. The opinion, as it relates to Petitioner's action, is set forth at pages 31A-34A of the Petition.

*Prematic Service Corporation and FIG Holding Company are non-wholly owned subsidiaries of Farmers Group, Inc.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Petitioner Has Not Presented Any Special or Important Reasons Justifying Review by the United States Supreme Court.

Rule 17 of the Rules of the Supreme Court of the United States sets forth the type of cases in which this Court will exercise its discretion to review a federal court of appeals decision. A reading of the Petition clearly demonstrates that the issues for which review is sought are not of the character which would justify review.

Although Petitioner lists some ten items as being the questions presented, all of these items fall into two categories for purposes of reviewing this Petition. First, should this Court utilize its limited resources to review factual and credibility determinations made by the District Court and affirmed as being supported by the evidence by the Court of Appeals for the Ninth Circuit? Second, should the decisions made by Petitioner's trial counsel as to the witnesses to be called and the evidence to be presented at trial be permitted to serve as the basis for invalidating the District Court's decision? It is submitted that the answer to both of these questins is in the negative and that no basis exists for granting the review sought by Petitioner.

II.

Factual and Credibility Findings Made by the District Court Do Not Provide a Basis for Review.

After two days of trial to the court, Petitioner rested her case and the District Court granted Respondent's motion to dismiss the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The District Court's Findings of Fact and Conclusions of Law, not submitted with the Petition, appear as an Appendix hereto. Relying upon exten-

sive testimony and exhibits, the District Court made detailed Findings of Fact (¶s 6-18) relative to Petitioner's lack of qualifications for the Securities Analyst position she sought. An unqualified employee need not be promoted. *See, e.g., East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 n. 9, 97 S.Ct. 1891, 52 L. Ed. 2d 453 (1977); *Teamsters v. United States*, 431 U.S. 324, 369 n. 53, 97 S.Ct. 1843, 52 L. Ed. 2d 396 (1977).

Although Petitioner may believe she was not paid appropriately while she was employed with Respondent, it was Petitioner's burden to come forward with some evidence of the alleged pay differential between herself and male employees at the time of trial, a burden which she did not carry. As the court stated in *Di Salvo v. Chamber of Commerce of Greater Kansas City*, 416 F. Supp. 844, 852 (W.D. Mo. 1976): "Determination of plaintiff's Title VII claim requires analysis of two considerations. First, plaintiff has the initial burden of establishing that defendant discriminated against her in compensation on the basis of her sex. If plaintiff fails to carry that burden, the inquiry ends and the defendant prevails." The District Court found and the Court of Appeals affirmed that no evidence of any kind was offered by Petitioner at the time of trial on the wage disparity issue.

As in the case of the promotion issue, the District Court heard and considered extensive testimony and documentary evidence as to the basis for Petitioner's termination. The factual and credibility findings in the Findings of Fact (¶s 21-32) fully supported the District Court's determination that Petitioner's termination was not for discriminatory or retaliatory reasons.

Finally, Petitioner offered no credible evidence at the time of trial that Respondent retaliated or discriminated against Petitioner in seeking other employment. As in the

case of the other issues, the Court of Appeals for the Ninth Circuit found this determination to be adequately supported by the record.

It is submitted by Respondent that Petitioner is seeking review of factual and credibility findings of the District Court which have been found to be adequately supported by the Ninth Circuit and that such a review is neither warranted nor appropriate.

III.

The Asserted Shortcomings of Petitioner's Counsel Do Not Justify Invalidating the District Court's Decision.

For the first time after Petitioner rested her case and received an adverse ruling, Petitioner questioned the tactics of her counsel. In particular, Petitioner complains that she was not called as a witness. In civil litigation such as an action which forms the basis for the Petition, litigants are bound by the acts and omissions of their attorneys. *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L. Ed. 2d 734 (1962). In *Link*, this Supreme Court upheld a dismissal for failure to prosecute which had been entered by the court on its own motion after plaintiff's counsel failed to appear for a scheduled pretrial conference. The plaintiff complained that he should not be penalized for his counsel's actions. This Court dismissed this objection by stating:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of

his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 US 320, 326, 25 L ed 955, 958.

Link v. Wabash R. Co., 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L. Ed. 2d 734.

In a footnote, this Court added that if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is a lawsuit against the lawyer, and that reopening the case would unjustly penalize the defendant for plaintiff's lawyer's mistakes. 370 U.S. 626, 634, n. 10. *See also: Polizzi v. United States*, 550 F.2d 1133 (9th Cir. 1976); *Kuhl v. United States*, 370 F.2d 20, 27 (9th Cir. 1966); *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573, 577 (4th Cir. 1973); *Johnson v. Town of Babylon, N.Y.*, 78 F.R.D. 337 (D.C. N.Y. 1978).

Petitioner had counsel at trial, and she should not be allowed to reopen the case because certain decisions were made as to the trial of the action with which she belatedly expressed disagreement only after judgment had been rendered against her. "[T]he merits or demerits of an attorney's representation in a civil action are not grounds for invalidating a verdict." *Bury v. McIntosh*, 540 F.2d 835, 836 (5th Cir. 1976).

Conclusion.

The United States Court of Appeals for the Ninth Circuit upheld the District Court's Findings of Fact on the promotion, equal pay, termination and retaliation questions as being adequately supported by the evidence before the District Court. The trial court's findings of fact are to be reversed only when they are "clearly erroneous." Rule 52(a), Fed. R. Civ. Proc.; *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Smith v. James Irvine Foundation*, 402 F.2d 772, 775 (9th Cir. 1968), *cert. denied*, 394 U.S. 1000.

It is submitted by Respondent that the District Court's Findings of Fact were fully supported by the record. It is further submitted that the Ninth Circuit's ruling against Petitioner on her argument that the trial tactics of her counsel in not calling her as a witness required a reversal of the trial court's decision was legally correct. Under these circumstances, no basis exists for granting Petitioner a Writ of Certiorari.

Respectfully submitted,

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Attorneys for Respondent,
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JACK H. HALGREN
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APPENDIX

APPENDIX.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Mary Taberoff, Plaintiff, v. Farmers Group, Inc., Defendant. Civil Action No. 74-1108-WPG.

Filed: June 11, 1979.

This matter was tried by the Court sitting without a jury on April 10 and 11, 1979. At the conclusion of plaintiff's case, defendant moved the Court to dismiss the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. This Court, having heard and considered all of the evidence presented by and on behalf of plaintiff and defendant, having observed the demeanor of the witnesses, having considered the credibility of the testimony offered, having considered all briefs of counsel and Pretrial Conference Order and other matters herein, having heard argument of counsel, and being fully advised in the premises, finds and concludes as follows:

FINDINGS OF FACT

1. This is an action for damages and injunctive relief based upon alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (hereinafter "Title VII") based upon sex.

2. Plaintiff, Mary Taberoff, is a female and a United States citizen. Plaintiff was first employed by defendant Farmers Group, Inc. (hereinafter "Farmers") on approximately January 2, 1962. She was employed in the capacity of Bond Accountant from 1962 to 1968 and in the capacity of Stock Accountant from 1968 until approximately May 15, 1972. Plaintiff worked in the Investment Department

at the Home Office of Farmers in Los Angeles during the entire period from January 1962 through May 1972.

3. Defendant, Farmers, is a corporation having its principal place of business within the Central District of California. At all times relevant hereto, defendant was an employer covered by the provisions of Title VII of the Civil Rights Act of 1964.

4. Plaintiff, Mary Taberoff, at all times relevant hereto resided within the Central District of California.

5. Plaintiff filed this lawsuit on April 23, 1974, together with three other named plaintiffs on behalf of themselves individually and others similarly situated. On August 21, 1975, the Court certified a class in connection with the litigation. In December of 1977, the defendants made an Offer of Judgment under Rule 68 of the Federal Rules of Civil Procedure. The Offer of Judgment was accepted on behalf of the class and the three individual plaintiffs other than Mary Taberoff, resulting in the final entry of a Decree on July 7, 1978. Plaintiff, Mary Taberoff, elected not to accept the Offer of Judgment and to have her individual case tried on the merits.

PROMOTION CLAIM

6. Securities Analysts working for Farmers analyze companies and make oral and written recommendations as to the advisability of purchasing, retaining or selling the stocks of those companies.

7. In looking for entry level Securities Analysts, the Company seeks individuals with a college degree and prefers individuals who have majored in finance, economics or accounting and who have a Masters of Business Administration.

8. The college degree requirement for the Securities Analyst position was established at least four years prior to

plaintiff's initial employment with Farmers in 1962. Considerations of sex were not involved in establishing the requirement. All Securities Analysts hired by Farmers after the degree requirement was established have held college degrees.

9. Mr. Richard Rudy, Vice President and Treasurer of Farmers, testified and the Court credits his testimony that a person with a college degree has received exposure and experience in organization, planning, intellectual discrimination, making decisions and may have some experience with economics, accounting and the profit motive. Mr. Rudy testified and the Court credits that these and other experiences obtained in securing a college degree are related to performance as a Securities Analyst. The Court is also of the view that an individual who has attended college is exposed to social contact with a variety of people, the social graces and getting along with others as well as how to communicate orally and in writing. The Court finds that a college degree is a job-related screening device for the Securities Analyst position.

10. The Court finds that the following abilities or characteristics are necessary for an individual to be qualified for an entry-level Securities Analyst position at Farmers: (a) exercising good judgment and common sense; (b) a stable personality and flexible intellect; (c) the ability to recognize that one may be wrong; (d) the ability to interact well with other people; and (e) the ability to communicate effectively in writing and orally. These abilities or characteristics are central to the job functions and successful performance of a Securities Analyst. Mr. Rudy offered uncontroverted testimony which the Court credits as to how each of these abilities or characteristics is involved in and central to the daily functioning of a Securities Analyst.

11. The plaintiff first sought a promotion to the position of Securities Analyst in about 1968.

12. Ms. Taberoff does not have a college degree. Ms. Taberoff graduated from high school in 1943 and did not pursue any further education which might be considered to be related to the Securities Analyst position until 1970 when she took two four-unit classes in investments and stock market functions at UCLA Extension in which she received a D and C, respectively.

13. Ms. Taberoff's work experience prior to joining Farmers was as a salesperson and a light bookkeeper. The Bond Accountant and Stock Accountant positions held by Ms. Taberoff while employed at Farmers involved routine clerical functions recording information concerning the purchases and sales of bonds and stocks. Ms. Taberoff's job functions at Farmers did not require the exercising of independent judgment or involve any analytical work.

14. Neither Ms. Taberoff's formal education nor her work experience qualified her for a Securities Analyst position.

15. Quite apart from formal education or work experience, the testimony of Mr. Rudy, Mr. Woo and Mr. Bock, which the Court credits, as well as the documentary evidence submitted at trial, demonstrated that Ms. Taberoff did not possess the abilities or characteristics found by the Court in Paragraph 10, *supra*, to be necessary to be qualified for an entry-level Securities Analyst position:

a. The record reflects in many places that Ms. Taberoff lacked the essential element of using good judgment and common sense. A few of the many examples of incidents indicating a lack of good judgment and common sense include:

1) At a 1967 meeting with Farmers' corporate counsel, Mr. George Maslach, Ms. Taberoff advised Mr. Maslach that she had some program going with the government but that she was not going to disclose the plan to anyone until she was paid $1,000,000 for it;

2) After Farmers had received complaints concerning Ms. Taberoff's calling inappropriate people at brokerage houses to check on delays in receiving stock certificates and using threatening language, it was decided that future calls should be made by Ms. Taberoff's supervisor. Ms. Taberoff's reaction was that if the function was going to be a supervisor's in the future she should be compensated at the supervisor's rate of pay for having made the calls in the past; and

3) On one occasion Ms. Taberoff observed some paperwork in a wastebasket which she incorrectly thought should not have been thrown away. Rather than initially approaching the person in whose wastebasket she found the material to attempt to clear up the matter, Ms. Taberoff took the material to her supervisor and accused her fellow employee of wrongdoing.

b. The record reflects a number of incidents which would justify Farmers' conclusion that Ms. Taberoff did not possess a stable personality and a flexible intellect. Exhibits A-31, A-32, A-34, A-35, A-40, A-41, A-44, A-48, A-61, A-62, A-64 and A-65, among other things, reflect accusations of work sabotage against coworkers, supervisors, and other departments; friction with coworkers; inability to accept supervision; asserted work and non-work-related conspiracies;

telephone bugging; inability to accept criticism; and the like.

c. Ms. Taberoff lacked the ability to recognize that she could be wrong. The uncontroverted testimony of Mr. Rudy and one of Ms. Taberoff's former supervisors, Mr. Larry Woo, as well as a number of exhibits, demonstrated Ms. Taberoff's problems in this area. Examples of Ms. Taberoff's inability to admit she could be mistaken include:

   1) An incident when plaintiff incorrectly recorded certain stock transfers involving the pension plan holdings of a company affiliated with Farmers; when advised of the correct way to record the stocks by her supervisor, Mr. William Bock, Ms. Taberoff refused to accept Mr. Bock's explanation, went to the head of the Department, Mr. Rudy, and argued the matter further with him after he had confirmed Mr. Bock's instructions;

   2) When Ms. Taberoff was counseled about calling the wrong people in brokerage houses concerning stock certificates, she initially refused to acknowledge that she had made the calls and asserted that it must have been someone else's fault; and

   3) Numerous exhibits reflect situations in which Ms. Taberoff demonstrated an inability to accept criticism or to recognize that she might have made a mistake.

d. Ms. Taberoff was not able to interact well with others. Exhibits from plaintiff's personnel file, including many of those mentioned in Paragraph 15b, *supra*, demonstrate that she had great difficulty getting along with her supervisors and coworkers. She continually

complained that Mr. Rudy, Mr. Woo, Mr. Bock and others in and outside of her department were harassing her and interfering with her work. She was unable to cooperate with coworkers to get the department's work accomplished. Ms. Taberoff's inability to interact well with others seemed to arise most often when she became involved in areas outside the routine functions of her own job.

e. Ms. Taberoff could not communicate effectively in writing or orally. A review of the Exhibits from Ms. Taberoff's personnel file which were written by her did not reflect an adequate writing ability. Moreover, a number of Exhibits reflect difficulties various employees of Farmers had in oral communication with Ms. Taberoff. One memorandum prepared by counsel for Farmers, Mr. Maslach, indicates that after meeting with Ms. Taberoff for several hours he still was not sure of what she was proposing or how it was to be accomplished.

16. Although plaintiff received high ratings on her personnel evaluations, these ratings reflected only that plaintiff was able to adequately perform the routine tasks of her job as a Bond or Stock Accountant. Furthermore, Farmers often gave overly-generous ratings to employees.

17. Farmers at one time promoted one individual without a college degree, Frank Reinesto, to the position of Securities Analyst. Mr. Reinesto's promotion occurred well before plaintiff was hired by Farmers and before the requirement for a college degree had been formalized. Mr. Reinesto's promotion came at a time when the Investment Department consisted of two people and after years of daily interaction with the then Securities Analyst, Mr. Rudy. Mr. Reinesto did pursue a number of investment courses, and the gaps in his educational background were the subject of

numerous counseling sessions with Mr. Reinesto over the years. Moreover, the college degree requirement may well have been the result of the Company's experience with Mr. Reinesto.

18. From the foregoing facts, the Court concludes that Ms. Taberoff was unqualified for the Securities Analyst position to which she sought a promotion. Ms. Taberoff was not qualified for the position by education or experience. Ms. Taberoff did not possess the abilities or characteristics necessary for a Securities Analyst and was unqualified for the position on this basis.

19. Since plaintiff was not qualified for the Securities Analyst position, she was not denied a promotion because of her sex. Farmers had legitimate reasons for its failure to promote plaintiff.

EQUAL PAY

20. Plaintiff presented no evidence whatsoever that the pay she received for her duties was any different from that received by male employees in her office for performing duties requiring the same skill, effort and responsibility.

TERMINATION

21. Ms. Taberoff made all kinds of accusations over a period of years that various people within and outside of the Investment Department were out to get her. Ms. Taberoff made a number of accusations against her supervisor, Mr. Bock. The Court finds no basis for these accusations.

22. In approximately April 1972, plaintiff's supervisor Mr. Bock instituted a program in the Investment Department whereby the two Stock Accountants in the Department would cross-train each other on their duties. Plaintiff was to be trained on pricing a mutual fund, and she was to transfer some of her work to the other Stock Accountant.

23. The cross-training was discussed with the Stock Accountants, including Ms. Taberoff, and the Bond Accountants, who were also involved in the program, before cross-training began. Ms. Taberoff did not raise any objection to the cross-training program.

24. Plaintiff received instructions on pricing the mutual fund during a period of approximately one month. Ms. Taberoff never indicated to her coworkers or to her supervisor, Mr. Bock, that she could not perform the new job tasks. On Friday, May 5, 1972, Ms. Taberoff told Mr. Bock that she was ready to price the mutual fund by herself, and she requested that Mr. Bock assign her the task.

25. On Monday, May 8, 1972, Mr. Bock asked plaintiff to do the mutual fund work. She refused to do it and complained that Mr. Bock was harassing her.

26. On Tuesday, May 9, 1972, Mr. Bock again asked plaintiff to do the mutual fund work. Ms. Taberoff reluctantly performed part of the work with Mr. Bock's help after debating the matter with Mr. Bock.

27. On Wednesday, May 10, 1972, Mr. Bock asked plaintiff to do the mutual fund work. She refused to do the work.

28. In view of plaintiff's refusal to perform the work he requested her to do, Mr. Bock recommended to his supervisor, Mr. Woo, on May 10, 1972 that plaintiff be terminated on grounds of insubordination.

29. On Thursday, May 11, 1972, Mr. Bock had not received a response from Mr. Woo and he again asked plaintiff to do the mutual fund work, and again she refused.

30. On May 11, 1972, Mr. Rudy and Mr. Woo decided that plaintiff should be given one more opportunity to do the mutual fund work and informed Mr. Bock to give Ms. Taberoff a written direction to price the mutual fund.

31. Plaintiff was not at work on Friday, May 12, 1972. On Monday, May 15, 1972, Mr. Bock again asked plaintiff to do the mutual fund work. He presented her with a written memorandum requesting that she do the work. Plaintiff threw the memorandum in the wastebasket and refused to do the work. Ms. Taberoff was terminated.

32. There is no evidence that plaintiff's superiors or coworkers harassed her or made it difficult for her to do her job.

33. Based upon the foregoing facts, plaintiff was justifiably terminated. Ms. Taberoff was not fired for discriminatory or retaliatory reasons.

RETALIATION

34. The only evidence presented which might arguably indicate that Farmers discriminated against plaintiff in any way after her termination was an Affidavit executed by a Ms. Hendrick. The Affidavit states that when Ms. Hendrick called Farmers for a job reference on plaintiff, a Farmers employee told Ms. Hendrick that plaintiff was a troublemaker and a "women's libber." Subsequently Ms. Hendrick executed a counteraffidavit which stated that she had signed the initial Affidavit after repeated pressure from Ms. Taberoff at a time when she was under the stress of an impending operation and while taking medication and that she did not recall nor had she ever been able to recall contacting anyone at Farmers concerning a reference for Ms. Taberoff. Ms. Hendrick was not called as a witness. In view of the counteraffidavit and Ms. Hendrick's not being present to testify, the initial Affidavit signed by Ms. Hendrick was disregarded by the Court.

35. The Court finds that Farmers did not retaliate or discriminate against Ms. Taberoff after her termination in connection with Ms. Taberoff's seeking other employment.

36. To the extent that any of the following Conclusions of Law also constitute Findings of Fact, they are deemed to have been so found by the Court and are incorporated herein.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter under 42 U.S.C. §2000e-5(f)(3), 29 U.S.C. §§2201 and 2202, and 28 U.S.C. §1343(4).

2. None of the claims asserted herein by plaintiff under Title VII are barred by any time limitation period in Title VII, any statute of limitations, laches, or any failure to comply with any statutory prerequisite to the institution of an action under Title VII.

3. There is no proof that plaintiff was discriminated against because of her sex with respect to pay.

4. The facts fail to establish that plaintiff was discriminated against because of her sex with respect to her requested promotion to the Securities Analyst position. Plaintiff was not qualified to be a Securities Analyst. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* does not require any employer to place an unqualified individual in a position. See, e.g., *Griggs v. Duke Power Co.* (1970), 401 U.S. 424; *Morita v. Southern Cal. Permanente Medical Group* (9th Cir. 1976), 541 F.2d 217, 219. An employer may consider personality traits as well as other qualifications for a position. See, e.g., *Frausto v. Legal Aid Society of San Diego, Inc.* (9th Cir. 1977), 563 F.2d 1324.

5. The defendant's termination of plaintiff on May 15, 1972 did not constitute discrimination because of sex under Section 703(a) of Title VII or retaliation under Section 704(a) of Title VII. Failure to comply with work directives, disruption of the work environment, continued disputes with

coworkers and supervisors constitute a valid basis for termination. See, e.g., *Jack v. American Linen Supply Company* (5th Cir. 1974), 498 F.2d 122; *Barnes v. Callaghan & Co.* (7th Cir. 1977), 559 F.2d 1102.

6. There was no post-termination retaliation by defendant against plaintiff in violation of Section 704(a) of Title VII.

7. If any Findings of Fact also constitute Conclusions of Law, they are deemed the conclusions of this Court and are incorporated herein.

8. Plaintiff having failed to adequately establish that defendant unlawfully discriminated or retaliated against her, defendant's Motion to Dismiss under Rule 41(b) of the Federal Rules of Civil Procedure must be granted.

9. Plaintiff is not entitled to monetary or other relief in this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 11, 1979.

/s/ William P. Gray
William P. Gray
United States District Judge

Approved as to Form:
LAW OFFICE OF RUSSELL SPECTER
By_____
Attorneys for Plaintiff